(1)
Supreme Court, U.S.
FILED
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No.

In the Supreme Court of the United States

CYNTHIA TAYLOR,

Petitioner,

v.

HAMILTON CARMOUCHE, MARGARET FELTON, and CITY OF GARY, INDIANA

Respondents.

On Petition for Writ if Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Seventh Circuit's misapplication of the standards set in *Connick v. Myers* derogates the holding of the Supreme Court that, the "right" of a municipal employee to protest racial discrimination is a matter inherently of public concern and is in conflict with other decisions of the Supreme Court and Circuit Courts.

II. Whether the Seventh Circuit invaded the province of the jury when it failed to comply with the standard of review regarding granting a judgment n.o.v. by making many factual and credibility determinations in favor of the movant.

LIST OF ALL PARTIES TO PROCEEDINGS IN THE APPELLATE COURT

The caption to the case contains the names of all the parties in this petition. Rebecca Smith was a party plaintiff/appellant in the proceedings in the lower courts. Rebecca Smith is not a party in this petition.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I.

THE SEVENTH CIRCUIT HAS DEROGATED THE HOLDING OF THE UNITED STATES SUPREME COURT IN *CONNICK V. MYERS* THAT THE "RIGHT" OF A MUNICIPAL EMPLOYEE TO PROTEST RACIAL DISCRIMINATION IS A MATTER

INHERENTLY OF PUBLIC CONCERN AND CONFLICTS WITH OTHER DECISIONS OF THE UNITED STATES SUPREME COURT AND THE SEVENTH CIRCUIT. 7

II.

THE RULE THAT ALL EVIDENCE AND INFERENCES MUST BE TAKEN IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY WHEN RULING ON A JUDGMENT N.O.V., MUST BE REAFFIRMED TO PREVENT COURTS FROM IMPROPERLY INVADING THE PROVINCE OF THE JURY. 19

CONCLUSION. 22

APPENDIX

SEVENTH CIRCUIT COURT OPINION. A1

NORTHERN DISTRICT OF INDIANA COURT OPINION B1

SEVENTH CIRCUIT COURT ORDER ON REHEARING. C1

TABLE OF AUTHORITIES

CASES PAGE

Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.,
898 F.2d 512 (7th Cir. 1990) 11

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 10, 19

Brady v. Southern Railway,
320 U.S. 476, 88 L.Ed. 239, 64 S.Ct.232 (1943) 11

Brown v. Disciplinary Committee of Edgerton,
97 F.3d 969 (7th Cir. 1996) 16

Button v. Kibby-Brown,
146 F.3d 526 (7th Cir. 1998) 11, 16

Christie v. Foremost Insurance Co.,
785 F.2d 584 (7th Cir. 1986) 11

Collins v. Illinois, 830, F.2d 692
(7th Cir. 1987) 8, 11

Connick v. Myers, 461 U.S. 138, 145,
103 S.Ct. 1684 (1983) 8, 11, 12, 16

*Continental Ore Co. v. Union Carbide &
Carbon Corp.*, 370 U.S. 690 (1962) 10, 19

Cross v. Cleaver,
142 F.3d 1059 (7th Cir. 1998) 11

Emmel v. Coca-Cola Bottling Co. of Chicago,
95 F.3d 627 (7th Cir. 1996) 11, 21

Feldman v. Ho,
171 F.3d 494 (7th Cir. 1999) 11

*Freeman v. Franzen,*695 F.2d 485 (7th Cir. 1982),
cert. denied, 463 U.S. 1214,77 L. Ed. 2d 1400,
103 S. Ct. 3553 (1983) 11

Givhan v. Western. Line Consolidated
*School Dist.,*439 U.S. 410,
99 S.Ct. 693, 696-97 (1979) 8, 11, 15

Hartman v. Board of Trustees of Community
College Dist. No. 508, 4 F.3d 465 (7th Cir. 1993) 16

Hulbert v. Wilhelm,
120 F.3d 648 (7th Cir. 1997) 11, 15

Johnson v. Zema Systems Corp.,
170 F.3d 734 (7th Cir. 1999) 11

Klein v. Trustees of Indiana University,
766 F.2d 275 (7th Cir. 1985) 8

Knox v. State of Indiana,
93 F.3d 1327 (7th Cir.. 1997) 11

Lytle v. Household Mfg.,Inc.,
494 U.S. 545 (1990) 10, 19

Marshall v. Porter County Plan Commission,
32 F.3d 1215 (7th Cir. 1994) 11, 16

Mathur v. Board of Trustees of So. Ill. Univ.,
207 F.3d 938 (7th Cir. 2000) 9, 11, 19, 21

Rakin v. McPherson, 483 U.S. 378 (1987) 12

Reeves v. Sanderson Plumbing, Inc.,
530 U.S. __, 120 S. Ct. 2097,
147 L. Ed. 2d 105 (2000) 9, 10, 19

Tindall v. Montgomery County Commission,
32 F.3d 1535 (11th Cir. 1994) 14

Voight v. Savell,, 70 F.3d 1552 (9th Cir. 1995) 13

Waters v. Churchill,
511 U.S. 661, 114 S.Ct. 1878 (1994) 11

Constitutional Provisions

U.S. Constitution, Amendment I 2

U.S. Constitution, Amendment XIV 2

Statutes

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 2101(c) 2

42 U.S.C. § 2000e-3 2

42 U.S.C. Section 1983 3

Federal Rules of Civil Procedure 50 . . . . . 3, 9, 18, 19

PETITION FOR WRIT OF CERTIORARI

The petitioner, Cynthia Taylor, respectfully petitions This Honorable Court to issue a writ of certiorari to the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The published opinion of the Seventh Circuit Court of Appeals was filed on May 24, 2000 (*Taylor v. Carmouche*, __F.3d__ (7th Cir. 2000)), and is set forth in the Appendix hereto (App. A). The order of the Seventh Circuit Court of Appeals denying Cynthia Taylor's petition for rehearing was filed on July 20, 2000, and is set forth in the Appendix hereto (App. C).

The unpublished Memorandum of Decision of the District Court for the Northern District of Indiana was filed on July 19, 1999 (*Cynthia Taylor and Rebecca Smith v. Hamilton Carmouche, Margaret Felton and City of Gary, Indiana*, 2:96 cv 504) and is set forth in the Appendix hereto (App. B).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the District Court of the Northern District of Indiana was entered on May 24, 2000 (App. A). The petitioner petitioned the Court of Appeals for rehearing which was denied on July 20, 2000. (App. C). This petition for

writ of certiorari is filed within ninety (90) days from that date, 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The First Amendment to the Constitution of the United States provides, in pertinent part, "Congress shall make no law abridging the freedom of speech..."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part: "Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Civil Rights Act of 1964 - Title VII provides in pertinent part, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice...or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter."

42 U.S.C. Section 1983 of the Civil Rights Act provides, in pertinent part, "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States ...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Federal Rule of Civil Procedure 50
(a) Judgment as a Matter of Law. (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

STATEMENT OF THE CASE

In 1993 and 1994, Cynthia Taylor and Rebecca Smith were each employed at the City of Gary Law Department. Cynthia Taylor was an assistant city attorney and Rebecca Smith was a secretary. During the course of their employment, they complained about racist behavior exhibited by Margaret Felton and

Hamilton Carmouche. Hamilton Carmouche was corporation counsel for the City of Gary and Margaret Felton later during this time period became city attorney. Cynthia Taylor and Rebecca Smith complained about the racist behavior in the Law Department to numerous individuals in the City including the Mayor and Deputy Mayor. During this period, Cynthia Taylor and Rebecca Smith were subjected to various adverse employment actions. At one point, Cynthia Taylor testified on behalf of Rebecca Smith at Smith's grievance hearing.

After Smith's grievance hearing Cynthia Taylor suffered more adverse employment actions and filed a complaint with the Department of Labor alleging discrimination and retaliation. During this same time, Cynthia Taylor was pregnant and suffering from a work related leg injury. Prior to Smith's grievance hearing, the City accommodated Cynthia Taylor's injury and she worked in a third floor Law Department office. The only way to access the main Law Department office was to climb more than two flights of stairs.

Cynthia Taylor was initially denied a medical or maternity leave. After a partial grievance hearing Taylor was granted maternity leave. Upon Cynthia Taylor's return from maternity leave, she was in need of physical therapy a few hours a week and was denied return to work without a medical evaluation from the City's doctor. This medical evaluation request was not

made prior to Taylor's leave and was never made when she sustained the leg injury nor was it requested in reference to her pregnancy. After receiving the evaluation, the City's doctor placed a restricted work schedule on Cynthia Taylor because she was unable to climb the stairs to the main Law Office which Hamilton Carmouche and Margaret Felton insisted that she do. Hamilton Carmouche refused to allow Cynthia Taylor to return to work.

Cynthia Taylor and Rebecca Smith brought state and federal claims against the City of Gary, Indiana, Hamilton Carmouche and Margaret Felton arising out of their employment in the Gary Corporation Counsel's office and the termination of that employment. Taylor and Smith alleged retaliation for the exercise of their rights under the First and Fourteenth Amendments to the United States Constitution, racial and sexual discrimination in employment, and other state and federal claims. A four-day jury trial was held from July 6 to July 10, 1998. At the close of plaintiffs' case, the Magistrate Judge entered judgment as a matter of law for the defendants on substantial portions of the First Amendment claims in this case, resulting in the dismissal of Smith from this case. The Magistrate Judge ruled that Taylor and Smith's speech was not a matter of public concern, and only addressed their private interests.

The remaining portion of Taylor's First Amendment claim was submitted to the jury, which returned a

verdict in favor of Taylor for and against defendant Carmouche for $20,000 in compensatory damages and $60,000 in punitive damages. On post-trial motions, the Magistrate Judge entered judgment n.o.v. for Carmouche and denied all other relief requested by Plaintiffs. In granting the judgment n.o.v., the magistrate judge ruled that the gap in time between the filing of the letter to the Department of Labor and the refusal to reinstate her upon her return from maternity leave was to remote to find retaliation.

Cynthia Taylor and Rebecca Smith appealed to the Seventh Circuit Court of Appeals. On May 24, 2000, The Court of Appeals issued its decision affirming the District Court's ruling. The Court of Appeals affirmed the District Court's ruling on the directed verdict but ruled that the District Court erred in its reasoning for granting the judgment n.o.v. The Court of Appeals then ruled that an unrelated factual issue justified the granting of the judgment n.o.v. There was a dissent by Justice Williams who disagreed that Taylor and Smith's speech was not of public concern and thus not entitled to constitutional protection. Justice Williams concurred with the majority decision granting the judgment n.o.v. Cynthia Taylor petitioned the Court of Appeals for rehearing. The petition was denied on July 20, 2000.

REASONS FOR GRANTING THE WRIT

This Petition Should Be Granted Because The Seventh Circuit Has Derogated the Holding of the

United States Supreme Court in *Connick v. Myers* That the "Right" of a Municipal Employee to Protest Racial Discrimination Is a Matter Inherently of Public Concern. The Seventh Circuit's Ruling That an Employee's Complaints That a Supervisor Acted in a Racist Manner Is Not Protected Speech Because it Is Not a Political View about What Legal Policies the Employer Should Adopt; and, That an Employee's Subpoenaed Testimony on Behalf of a Coworker Is Not Protected Because it Occurred in the Context of an Internal Grievance Hearing Is in Conflict with Decisions of the United States Supreme Court and the Circuit Courts. Additionally, Although Federal Rule of Civil Procedure 50 Requires That All Evidence and Inferences Must Be Taken in the Light Most Favorable to the Non-Moving Party, the Seventh Circuit Invaded the Province of the Jury When it Made Numerous Factual and Credibility Determinations After the Jury's Verdict While Drawing Inferences in Favor of the Moving Party.

I.

The Seventh Circuit Has Derogated the Holding of the United States Supreme Court in *Connick V. Myers* That the "Right" of a Municipal Employee to Protest Racial Discrimination Is a Matter Inherently of Public Concern and Conflicts with other Decisions of The United States Supreme Court and The Seventh Circuit.

The First Amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people. Speech concerning public affairs is more than self-expression; it is the essence of self-government" and it occupies the "highest rung of the hierarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684 (1983). In *Connick*, this Court held that the "right" of a municipal employee to "*protest racial discrimination [is] a matter inherently of public concern.*" *Connick, supra*, 103 S.Ct. at 1691, n. 8 (emphasis added), citing *Givhan v. Western. Line Consolidated School Dist.*, 439 U.S. 410, 415-16, 99 S.Ct. 693, 696-97 (1979). In the instant case, the petitioner's protest against racism in the City of Gary Law Department, an agency with a duty to uphold the law for its citizens is unquestionably a matter of public concern.

In *Collins v. State of Illinois*, 830 F.2d 692, 702 (7th Cir. 1987), the court held:

> The relative burdens for proving a retaliation claim parallel those established for proving a race discrimination claim. See *Klein v. Trustees of Indiana University*, 766 F.2d 275, 280-81 (7th Cir. 1985). Plaintiff first has the burden of establishing a prima facie case of retaliation. The burden then shifts to defendants to articulate a legitimate nondiscriminatory reason for the challenged action. If defendants make that

> articulation, the burden shifts back to plaintiff to prove that the defendants' proffered reason is a pretext for an underlying retaliatory reason.

To establish a prima facie case of retaliation, the plaintiff must show that (1) she engaged in statutorily protected expression; (2) she suffered an adverse action by her employer; and (3) that there is a causal link between the protected expression and the adverse action. *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. __, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105, ___ (2000); *Mathur v. Board of Trustees of So. Ill. Univ.*, 207 F.3d 938 (7th Cir. 2000).

In *Reeves v. Sanderson Plumbing Products, Inc.*, this Court delineated the standard of review for ruling on a judgment as a matter of law. "Under Rule 50, a court should render judgment as a matter of law when " a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue"." *Reeves* at 2109. This Court stated that "[w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. __, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105, ___ (2000) In *Reeves*, this Court held:

> "... in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Lytle v. Household Mfg.,Inc.*, 494 U.S. 545,554-555 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, n. 6 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby, supra* at 255. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.... That is, the court should give credence to the evidence favoring the non-movant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses"." *Reeves* at 120 S. Ct. 2110.

In the instant case, the Trial Court and Court of Appeals made numerous gross factual and credibility determinations contrary to this well-settled rule as outlined above. Each critical issue decided in this case is marred by this defect. For example, Taylor's argument since the inception of this case is that she complained through the chain of command at the City of Gary about

racism in the Law Department; that she spoke out on behalf of the African-American secretaries and African-American attorneys; that the only grievance she filed was filed after she was suspended and denied medical leave; and that she suffered adverse employment actions as a result, the most severe actions occurring after testifying at the grievance hearing for Smith. In spite of the evidence, these courts continue to rule that her speech was about internal grievances. To reach this conclusion, the Court made many erroneous factual determinations, judged credibility and weighed evidence.

The Seventh Circuit's decision in the instant case, conflicts with decisions of this Court and the Circuit Courts, cited as follows: *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 1691, n. 8 (1983); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979); and *Hulbert v. Wilhelm*, 120 F.3d 648, 654 (7th Cir. 1997); *Button v. Kibby-Brown*, 146 F.3d 526, 529 (7th Cir. 1998); *Marshall v. Porter County Plan Commission*, 32 F.3d 1215 (7th Cir. 1994); and *Hartman v. Board of Trustees of Community College Dist. No. 508*, 4 F.3d 465 (7th Cir. 1993); *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878 (1994); and *Feldman v. Ho*, 171 F.3d 494 (7th Cir. 1999); *Knox v. State of Indiana*, 93 F.3d 1327 (7th Cir.. 1997); *Collins v. State of Illinois*, 830 F.2d 692, 697 (7th Cir. 1987); *Cross v. Cleaver*, 142 F.3d 1059 (7th Cir. 1998); *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 746 (7th Cir. 1999); *Brady v. Southern Railway*, 320 U.S. 476, 88 L.Ed. 239, 64 S.Ct.232 (1943); *Christie v. Foremost Insurance Co.*, 785 F.2d 584, 585-86 (7th Cir. 1986); *Freeman v. Franzen*, 695 F.2d 485, 489 (7th Cir. 1982), cert. denied, 463 U.S. 1214, 77

L. Ed. 2d 1400, 103 S. Ct. 3553 (1983); and *Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.*, 898 F.2d 512, 515 (7th Cir. 1990); *Mathur v. Board of Trustees*, No. 98-3431 (7th Cir. March 27, 2000), citing *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 634 (7th Cir. 1996). Consideration by this Court is therefore necessary to secure and maintain uniformity of the Court's decisions.

In addition to the erroneous factual determinations and misapplication of the standard of review, the Court of Appeals failed to distinguish between the speech of Taylor, an attorney, and that of Smith, a secretary. The thrust of the court's opinion was to dismiss the speech in this case as petty employment grievances although it was petitioner's contention that many of the office problems were a result of Felton's racist behavior and the grievances resulted from retaliatory conduct by Felton and Carmouche. Taylor's speech was unquestionably about race.

The Seventh Circuit affirmed the District Court ruling, relying on its interpretation of *Connick* stating that "whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record."(App. B-14). As stated above, the court did not review the record as a whole in the light most favorable to petitioner. Instead, the court made many factual and credibility determinations in favor of the defendants who lacked any credibility at trial.

Taylor's speech was unquestionably about race. The only true issue under *Connick* would be whether the City's interests in the efficiency of its legal department outweigh the employee's interests in speaking out. Taylor's interest in free speech was not outweighed by her employers' interest in a smooth, efficient law department. In *Rakin v. McPherson*, 483 U.S. 378 (1987), the Supreme Court held that where an employee did not hold a policymaking, public contact or confidential position, the danger that her speech would interfere with her employer's operations was minimal. In *Voight v. Savell*, 70 F.3d 1552 (9th Cir. 1995), the court held that where the plaintiff's speech concerned internal personnel practices, the employer's burden was not onerous. Here, Taylor was a low-ranking attorney in a municipal law office that spoke out against racism and sexism in general and as it affected internal decisions and internal office functions. The alleged "burden" to the City of Gary from this speech is purely speculative; certainly no evidence of burden was offered. Moreover, the evidence showed that the Gary law department was dysfunctional, and that much of the blame is attributable to Carmouche's viscous, ugly racism that permeated the office and affected every decision made in that office.

Significantly, any claimed disruption of the office resulting from plaintiff's statements to Carmouche that Felton is a racist etc., resulted not from plaintiff's speech, but *from Carmouche's repeated acts of informing Felton that the plaintiffs had spoken out against her racism, i.e.* which was the equivalent of Carmouche pouring gasoline on a fire.

It is disingenuous for the employer to argue that speech which is privately communicated to the supervisor, and at the request of that supervisor, results in an unacceptable burden to the employer, where the only possible burden results from the supervisor's desire to share the private communication with the intermediary-level employee that was the subject of the speech. Likewise, it is disingenuous for the employer to claim any burden from testimony given at a Personnel Committee grievance hearing conducted in accordance with the employer's personnel procedures.

However, the Seventh Circuit found that Taylor's speech was not protected for three reasons which the dissent persuasively refutes: First, the court held that Taylor was only complaining about labor-management issues within the context of the personnel hierarchy. (App. A-7) However:

a. The court ignored evidence that Taylor spoke to the Mayor and Deputy Mayor, outside personnel channels.

b. The court derogates the importance of Taylor's subpoenaed testimony on behalf of Smith. Cf. *Tindall v. Montgomery County Commission*, 32 F.3d 1535 (11th Cir. 1994)(holding that testimony in a legal proceeding on behalf of coworkers was a matter of public concern) (App. A-12, Dissent,). The unsupported holding that testimony in an internal grievance procedure (as opposed to a lawsuit) is not protected is bad policy. Employees should be protected whenever they testify under oath. The

sanctity of testimonial proceedings is advanced, not lessened, by the enforcement of laws protecting the witnesses from retaliation.

c. Moreover, this Court should resolve the inconsistency between argument disfavoring speech in purely internal channels, and the argument disfavoring speech that would compromise the government's interests as an employer in the efficiencies of its offices. The correct balance is set forth in cases such as *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979); and *Hulbert v. Wilhelm*, 120 F.3d 648, 654 (7th Cir. 1997) (even private protests through internal channels do not deprive speech of constitutional protection). (App. A-12, Dissent).

Second, the court found that Taylor was protesting in her capacity as an employee, not a citizen. (App. A-7-9) Here, in an effort to convince that Taylor was engaged in a petty employee grievance, i.e. that she was jealous of Felton, the panel again ignored evidence, refuting the "jealousy" charge and improperly decided a fact issue in favor of the Appellee.

More importantly, the court erred in holding that protests against perceived racist acts should not be protected absent a showing that the employee was engaged in a public debate as opposed to contending that "race influenced what happened to them on the job." (App. A-8). This holding would eradicate First Amendment protection whenever a public employee

protests conduct that violated a *settled public policy* that was already *beyond debate* among persons of goodwill (i.e. that racism in public employment cannot be tolerated). With due respect to the majority, there is simply no room for "*debate*" as to whether "*it was desirable for Gary to hire racists.*" (App. A- 8). That "debate" was settled long ago with the adoption of the Equal Protection Clause. The challenge for more than two centuries has been to combat racism whenever it surfaces, particularly in government. For this reason, protests against racism are inherently a matter of public concern. *Connick, supra.* The First Amendment must protect speech in its practical applications, when it is applied to enforce a policy that is already beyond debate.

In *Brown v. Disciplinary Committee of Edgerton*, 97 F.3d 969, 972 (7th Cir. 1996), the court held that "public concern" does "not mean matters of *transcendental importance* -they mean matters in which the public might be interested, as distinct from wholly-personal grievances." (citations omitted). Taylor's speech should be protected under this standard because: (a) as a matter of law, the public is interested in whether the City of Gary hired racists who were discriminating against the African-American staff; and (b) Taylor, in speaking out for the secretaries, was not advancing a "wholly-personal grievance" (despite the court's attempt to tarnish her with the disputed claim that she was jealous of Felton).[1]

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[1] IF TAYLOR HAD MIXED MOTIVES BETWEEN HER PERSONAL INTERESTS AND HER CONCERN OVER RACISM, HER SPEECH

Third, the court characterized Taylor's speech as a "mundane issue of fact" and as "defamatory", and held that persons who make "*unsupported* defamatory statement[s] may be penalized without offending the first amendment." (App. A-10). As Judge Williams explained, the court has confused the law of defamation with public employee speech. (App. A-13, Dissent). The proper inquiry here is whether the speech was a matter of public concern and whether the government's interests as employer in the efficiency of the office were compromised. These questions should have been resolved in Taylor's favor. The court improperly characterized the allegations of racism as "mundane" statements that "Felton is a racist" as though that personal characterization was divorced from Felton's conduct, her attitude and her expression of that attitude in her communications with secretaries as typified by her "pack of dogs" reference. Apparently the Seventh Circuit sympathized with Felton for trying to be a "taskmaster" and views the African-American secretaries as insubordinate. (App. A-2). In other words, the court engaged in impermissible fact-finding and apparently drew its own conclusion that the charges of racism where "unsupported." (App. A-11). Carmouche made this argument at trial, and he lost. For the Seventh Circuit to adopt that view on appeal is clearly erroneous, since Taylor was entitled to have all disputed facts and all

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529; *MARSHALL V. PORTER COUNTY PLAN COMMISSION*, 32 F. 3D 1215; AND *HARTMAN V. BOARD OF TRUSTEES OF COMMUNITY COLLEGE DIST. NO. 508*, 4 F.3D 465.

inferences therefrom decided in her favor.

Moreover, the Seventh Circuit did not take seriously the ample, unrebutted testimony of Carmouche's foul, racist insults. Even giving credence to an alleged effort to improve efficiency, the racially inflammatory comments created a hostile, abusive atmosphere that Taylor was justified in protesting.

In sum, the Seventh Circuit begged the question of whether the accusations against Felton and Carmouche were unsupported. When Taylor protested her supervisors' racism, the City of Gary could have, and should have, held internal hearings to determine if the accusations were substantiated. The City abdicated this responsibility and instead permitted Carmouche to retaliate against the protesting employees. There is no principle of law that would allow the City (in its capacity as an employer instead of sovereign) to terminate Taylor, without giving her a hearing, for the express reason that she accused someone of racism. Yet, the Seventh Circuit permits Carmouche to constructively discharge Taylor and to otherwise retaliate against her because he, Carmouche, supposedly determined, all by himself, that Taylor was wrong (and he was right). This grant of power to Carmouche is far too excessive and exceeds any legitimate interests of the government as employer. For all these reasons, and as stated in Judge Williams' dissent, the Seventh Circuit erred.

II.

THE RULE THAT ALL EVIDENCE AND ALL INFERENCES FROM THE EVIDENCE SHALL BE CONSIDERED IN THE NON-MOVANT'S FAVOR IN A JUDGMENT N.O.V. MUST BE REAFFIRMED.

The Seventh Circuit agreed with Appellants that the Magistrate Judge erred in his reasons for setting aside the jury's verdict for Taylor and granting Carmouche judgment as a matter of law. However, the court found a new reason to affirm the rejection of the verdict for Taylor by holding that there was an absence of evidence that Carmouche imposed a "penalty" on Taylor as a result of her letter to the DOL on September 23, 1994. (App. A-6). This holding contradicts the Magistrate Judge's ruling that the issue of constructive discharge after the DOL letter was a "question of fact." (R. 77, p. 6,9).

The review of a trial court's grant or denial of judgment as a matter of law under Rule 50 is de novo. *Mathur* at 941. The Seventh Circuit stated, "...we are limited to assessing whether no rational jury could have found for the plaintiff." *Id.* As discussed above, this Court set out the standard for granting or denying a judgment n.o.v. in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. __, 120 S. Ct. 2097, 147 L. Ed. 2d 105, ___ (2000). This Court stated that the court should review all of the evidence in the record but must draw all reasonable inferences in favor of the nonmoving party, and it may

not make credibility determinations or weigh the evidence. *Reeves citing Lytle v. Household Mfg., Inc.*, 494 U.S. 545,554-555 (1990); *Liberty Lobby, Inc. supra* at 254; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, n. 6 (1962).

In the instant case, the Seventh Circuit made numerous factual and credibility determinations contrary to this standard. For example, although Carmouche testified that he had policy-making authority in the law department and Taylor was never advised of a medical certification prior to her leave, the court held that there was no penalty since Carmouche was just enforcing a City requirement. The court ignored the fact that Taylor was not required to get a medical certification when she sustained her leg injury or for her maternity leave. The court ignored that despite receiving the certification, Taylor was still refused reinstatement although the medical recommendations submitted after the evaluation were ordered were provided by the City's doctor. The court further ignored that the restrictions placed on Taylor by the City's doctor resulted from the insistence by Carmouche and Felton that Taylor work in the main office which required her to climb more than two flights of stairs. They insisted Taylor work on the fourth floor even though there was a handicap accessible office on the third floor only a few feet from the base of the stairs to the main office.

The Seventh Circuit viewed little if any of the evidence in the light most favorable to the petitioner. In contrast,

the trial judge held:

> "Also on the issue of constructive discharge, I believe that there is a factual dispute as to what happened on December 19th, 1994 and thereafter. Viewing the evidence in the light most favorable to the plaintiff, the jury could find that the plaintiff was left in limbo, did not know whether or not she would have her job back, and that this situation occurred for a period of several months. Under all of the circumstances, I do not believe that I can rule as a matter of law that she was not constructively discharged. I believe that that is an issue for the jury to decide." (R. 77, p.6).

> "...I believe that there is sufficient evidence from which a reasonable jury could find that she was discriminated against when she attempted to return on December 19th; that she was harassed in the form of changing the job duties. There is sufficient evidence from which they could find that the plaintiff was accommodated before she requested the leave, but they refused to accommodate her after the leave." (R. 77, p. 9).

The evidence was more than sufficient to reach the jury and to persuade the jury to render a verdict for Taylor.

The evidence supported the jury's finding that Carmouche caused Taylor's constructive discharge in retaliation for her DOL complaint (and her earlier charges

of racism). The Magistrate Judge was correct in finding that this was a fact issue for the jury. Carmouche's arguments that the events of December 19, 1994, were not retaliatory, were just that - *fact arguments* - which the jury reasonably rejected. "[T]his court may not step in and substitute its view of the contested evidence for the jury's." *Mathur v. Board of Trustees*, No. 98-3431 (7th Cir. March 27, 2000), citing *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 634 (7th Cir. 1996).

It is important that this Court accept this case so that it can remind the subordinate courts that it is impermissible to make credibility determinations, omit or mischaracterize evidence, or to draw adverse inferences against the non-moving party. Review is necessary to help preserve the integrity of the judicial system.

CONCLUSION

Racial discrimination in a governmental office is a matter of public concern. This Court has clearly stated the standard of review for granting a judgment n.o.v. These standards must be maintained. When courts fail to uphold the law or fail to fairly apply the law it chills speech, denies citizens access to the justice system and denigrates the integrity of the judicial system.

For all the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Seventh Circuit. Petitioner respectfully urges this Court to reverse the decisions of the courts below and reinstate the jury verdict and/or

remand this case for trial.

Respectfully submitted,

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